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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DIAMOND JONES, Defendant and Appellant.	B271129 (Los Angeles County Super. Ct. No. TA083886-01)

APPEAL from an order of the Superior Court of Los Angeles County. Ricardo R. Ocampo, Judge. Affirmed.

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Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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A jury convicted defendant Diamond Jones of attempted murder in 2006 and he was sentenced to 40 years to life in prison. In 2016, the court granted his motion to correct his sentence, reducing it to 32 years to life. Defendant appealed. We have reviewed the matter pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106 (*Kelly*). For the reasons set forth below, we affirm the court's order.

FACTUAL AND PROCEDURAL SUMMARY

On December 13, 2006, a jury found defendant guilty of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 187, subd. (a), 664),[1] and found true that a principal in the commission of the crime personally and intentionally discharged a firearm, and proximately caused great bodily injury to another. (§ 12022.53, subds. (d) & (e).) The jury also found that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).)

In January 2007, the court sentenced defendant to 40 years to life in prison, consisting of: (1) life in prison with the possibility of parole for attempted willful, deliberate, and premeditated murder (§ 664); (2) a minimum of 15 years in prison before defendant could be eligible for parole, based upon the gang enhancement statute (§ 186.22, subd. (b)(5)); and (3) a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). Defendant appealed, but did not raise any issue concerning his sentence. In September 2008, we affirmed the conviction in an unpublished decision. (*People v. Jones* (Sept. 9, 2008, B197557) [nonpub. opn.].)

Seven years later, in October 2015, defendant, with the aid of counsel, filed a motion to correct an illegal sentence. Defendant asserted that the sentencing court should have stayed the 15-year minimum parole eligibility requirement imposed under the gang enhancement statute. He relied on this court's decision in *People v. Valenzuela* (2011) 199 Cal.App.4th 1214

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[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

(*Valenzuela*), which involved a similar sentencing scenario. In *Valenzuela*, we held that when the court imposed the 25-years-to-life firearm enhancement under section 12022.53, subdivisions (d) and (e), and the defendant did not *personally* use or discharge a gun, the court should have stayed the 15-year minimum parole eligibility requirement under the gang enhancement. (*Valenzuela*, *supra*, 199 Cal.App.4th at p. 1238; see also *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1424-1427 (*Gonzalez*).)

At the hearing on defendant's motion in February 2016, the court noted that defendant was not present in court and stated: "I don't believe we need him [in court] because the sentence will be actually reduced rather than increased." The court then asked if defense counsel would waive defendant's appearance "for that purpose." Counsel said, "I will."

The court summarized the nature and basis of defendant's motion and asked the deputy district attorney to confirm that the People conceded the sentencing error, which she did. The court then resentenced defendant on the attempted murder count to a life term with minimum parole eligibility of 7 years, plus a consecutive 25-years-to-life term under section 12022.53, subdivisions (d) and (e).[2] The court also stayed the 15-year minimum parole eligibility requirement under section 186.22, subdivision (b)(5). The total term is thus 32 years to life.

Defendant appealed. He attached to his notice of appeal a document asserting numerous contentions.

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[2] The minimum term of 7 years before parole eligibility is based upon section 3046, which provides:

"(a) An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following:

"(1) A term of at least seven calendar years.

"(2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole.

"(b) If two or more life sentences are ordered to run consecutively to each other pursuant to Section 669, an inmate so imprisoned shall not be paroled until he or she has served the term specified in subdivision (a) on each of the life sentences that are ordered to run consecutively."

We appointed counsel to represent defendant. On August 22, 2016, counsel filed a brief pursuant to *Wende*, *supra*, 25 Cal.3d 436, raising no issues on appeal and requesting that we independently review the record to determine if the lower court committed any error. Counsel provided a declaration stating that she sent a copy of her brief and copies of the record on appeal to defendant and informed him of his right to file a supplemental brief and to request that the court relieve her as his attorney.

On October 24, 2016, defendant filed a supplemental brief. We address the contentions he raised in the attachment to his notice of appeal and his supplemental brief.

DISCUSSION

Defendant asserts he was denied his federal due process right to be present at the hearing on the motion to correct his sentence. Under the federal constitution, a "defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." (*U.S. v. Gagnon* (1985) 470 U.S. 522, 526; see also *Kentucky v. Stincer* (1987) 482 U.S. 730, 745 ["a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"]; accord, *People v. Waidla* (2000) 22 Cal.4th 690, 742.)

Here, the relevant proceeding was a hearing on defendant's uncontested motion to correct his sentence. There were no witnesses or argument. After confirming that the People conceded the sentencing error, the court granted all the relief defendant requested. Under these circumstances, defendant's absence from the proceeding did not thwart a fair and just hearing, and there is no showing that his presence would have contributed to the fairness of the procedure. We therefore reject this argument.

Next, defendant contends that his appellate counsel was ineffective for failing to raise arguments "of unconstitutional sentencing error" regarding section 12022.53, subdivisions (d) and (e)(1). When the firearm enhancement

under section 12022.53, subdivision (e)(1) is alleged, he argues, the requirements of section 12022.53 and section 186.22 must be pleaded and proved. He is correct: section 12022.53, subdivision (e)(1), makes the enhancement described in that section applicable when it has been pleaded and proved that: (1) the defendant violated section 186.22, subdivision (b); and (2) "[a]ny principal in the offense committed any act specified in subdivision (b), (c), or (d)" of section 12022.53. (§ 12022.53, subd. (e)(1)(B).) There was no error, however, because these allegations were alleged in the information and the jury found them true.

Defendant might be arguing that his former appellate counsel was ineffective for failing to raise in the 2007 appeal the sentencing error that was eventually corrected in 2016. Even if this claim is cognizable in this appeal and we assume that defendant's appellate counsel was constitutionally deficient for failing to raise the sentencing issue in the first appeal, defendant is not entitled to relief. If his counsel had raised the issue in 2007, the best result he could have obtained is the reduction of his sentence from 40 years to life to 32 years to life—the result he has now achieved. (Cf. *People v. Speight* (2014) 227 Cal.App.4th 1229, 1249 [when counsel was ineffective at sentencing hearing, remedy is to remand for resentencing].) Any claim of ineffectiveness is therefore moot.

Defendant next argues that the gun enhancement under subdivision (d) of section 12022.53, "should be modified and stricken or stayed" because "it was alleged that [he] was a driver in this case and not the shooter." Ordinarily, he explains, a gun enhancement under section 12022.53, subdivision (d) applies only to a defendant who *personally* used or discharged a firearm. He is correct. (See *Gonzalez*, *supra*, 180 Cal.App.4th at p. 1424.) The argument, however, ignores subdivision (e) of that statute, which, when the requirements of that subdivision are met, expands the enhancement to encompass "any person who is *a principal* in the commission of an offense." (§ 12022.53, subd. (e)(1), italics added.) A principal includes "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission." (§ 31.) Even if he was merely the driver for the shooter, he was nevertheless "concerned in

the commission of a crime." He was thus a principal in the crime and, therefore, subject to the enhancement under section 12022.53, subdivision (e).

Defendant makes a similar argument in his supplemental brief under his "CONCLUSION." There, he cites to *People v. Montes* (2003) 31 Cal.4th 350.[3] *Montes* held that the 15 year minimum eligibility requirement under the gang enhancement statute applies only if the defendant commits a felony that, by its own terms, provides for a life sentence. (*Id.* at p. 352.) *Montes* does not affect defendant's sentence because the now-stayed 15-year minimum eligibility requirement related to defendant's attempted murder conviction, which provides for a life sentence "by its own terms" under section 664.

Defendant further contends that the striking of the gang enhancement makes the imposition of the firearm enhancement "an unauthorized sentence in violation of [his] due process rights." (Capitalization omitted.) The court, however, did not strike the gang enhancement; it merely stayed the enhancement that would have been operative in the absence of the longer gun enhancement. (§ 12022.53, subd. (e)(2); *Valenzuela*, *supra*, 199 Cal.App.4th at p. 1238.) The stay of the gang enhancement penalty does not render the gun enhancement illegal.

Defendant further contends that because the gang enhancement was "reduce[d] and stricken from the record" (capitalization omitted), the jury's finding of premeditation should also be stricken "because without the gang findings[,] there is no premeditation." As stated above, the court did not strike the gang enhancement. More importantly, the staying of the gang enhancement penalty is unrelated to the jury's premeditation finding.

In his supplemental brief, defendant argues that the evidence was insufficient to establish that "the Peda Roll Squad Clique of the Grape Street Crips subsets are part of the larger Grape Street organization." (Capitalization omitted.) The argument challenges the sufficiency of the evidence to support the jury's finding on the gang enhancement. This issue

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[3] Defendant requests that we take judicial notice of the *Montes* decision. Because we can consider the *Montes* decision without taking judicial notice of it, we decline the request.

was reviewable on appeal from the conviction and cannot be raised in this appeal from the order correcting the sentence. (Cf. *People v. Lynn* (1978) 87 Cal.App.3d 591, 593.) Even if cognizable in this appeal, defendant has failed to provide an adequate record to evaluate the claim. (See *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 [appellant has the burden to provide an adequate record to permit review of a claimed error].)

Lastly, defendant contends that there was no evidence that he *knew* of his gang's primary activities or pattern of criminal activity. This argument, like the preceding argument, is a collateral attack on the judgment and unreviewable in this appeal. Moreover, the People were not required to prove such knowledge in order to establish the gang enhancement under section 186.22, subdivision (b). The "scienter element of the enhancement requires only 'the specific intent to promote, further, or assist in *any* criminal conduct by *gang members*.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 51.)

In addition to considering defendant's specific contentions, we have reviewed the record on appeal and are satisfied that defendant's counsel has fully complied with her responsibilities and that no arguable appellate issue exists. (*Wende, supra,* 25 Cal.3d at pp. 439-442; *Kelly*, *supra*, 40 Cal.4th at p. 110.)

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.